



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2004

Ms. Frances Kendall
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2004-2428

Dear Ms. Kendall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198260.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for certain cost reports, survey reports, policies, and staffing schedules relating to Kerrville State Hospital as well as commitment documents regarding a named patient. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

We begin by noting that the submitted information contains completed reports and court-filed documents, which are expressly public under section 552.022 of the Government Code. *See* Gov't Code § 552.022(a)(1), (17). Completed reports may not be withheld unless they are confidential under other law or excepted from disclosure under section 552.108. *See id.* § 552.022(a)(1). Court-filed documents may not be withheld unless they are confidential under other law. *See id.* § 552.022(a)(17). You do not claim that any of the submitted information is excepted under section 552.108. You assert instead that it may all be withheld pursuant to section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a).

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

See Dallas Area Rapid Transit v. Dallas Morning News, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the completed reports and court-filed documents we have marked may not be withheld pursuant to section 552.103. Because you do not claim and our review does not indicate that these documents are confidential under other law, they must be released.

We turn now to your arguments regarding section 552.103 for the remaining submitted information, which is not subject to section 552.022. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a

factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

In this instance, you inform us that, prior to the date it received this request for information, the department received a notice of claim concerning the patient at Kerrville State Hospital who is the subject of this request. You represent to this office that the notice of claim meets the requirements of the TTCA. Based on this representation, we agree that litigation was reasonably anticipated by the department on the date that it received this request. Furthermore, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that information that is not subject to release under section 552.022 may be withheld from disclosure at this time pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which all of the parties in the anticipated litigation have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the completed reports and court-filed documents we have marked must be released in accordance with section 552.022. The remaining submitted information may be withheld under section 552.103 unless all parties to the anticipated litigation have previously had access to it.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/lmt

Ref: ID# 198260

Enc. Submitted documents

c: Ms. Christine Kirchner
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(w/o enclosures)